

SD-10-29

ARCHITECTURAL/ENGINEERING CONTRACT
STATE OF SOUTH DAKOTA AGREEMENT FOR

FT. PIERRE CHOTEAU SITE IMPROVEMENTS
FT. PIERRE, SOUTH DAKOTA
OSE# ACC11--02X

THIS AGREEMENT made and entered into this 29th day of November, 2010 by and among the State of South Dakota, acting through its **Office of the State Engineer**, Bureau of Administration, Joe Foss Building, 523 East Capitol Avenue, Pierre, South Dakota 57501-3182 and **Department of Tourism and State Development**, herein collectively referred to as the State, and **Architecture Incorporated**, 415 South Main Avenue, P.O. Box 2140, Sioux Falls, South Dakota 57101-2140, herein referred to as the Architect/Engineer.

WITNESSETH:

WHEREAS, the State of South Dakota through its duly authorized Agent and the Architect/Engineer intends to **provide improvements for the Ft. Pierre Chateau Site**. The scope of professional services through **Schematic Design phase** shall include:

- **Coordination and meetings with the Owner's representatives;**
- **Travel, meeting time and minutes for three meetings;**
- **Design; drafting; 3-d modeling and estimate;**
- **Provide Schematic Design report with project scope, schedule and cost estimates;**
- **Include services of Historical Architect Consultant (MacDonald & Mack Architects);**
- **Landscape Architect Consultant (Wyss Associates, Inc.) - trail layout and material consulting as well as suggestions for interpretive signage locations;**
- **Civil Engineer (Brosz Engineering, Inc.) - Legal and Topographical Survey of the 33-acre site.**

Services shall exclude heating, ventilating, air-conditioning (HVAC), site lighting and elevator design. Services beyond Schematic Design phase (Part II B), and / or other services as deemed necessary will be added by modification to this contract;

WHEREAS, the State, through the Department of Tourism and State Development and the Bureau of Administration, has complied with the duties defined in SDCL §§ 5-14-3, 5-14-5, 5-14-6, and 5-14-9; and,

WHEREAS, the State desires to obtain the services of the Architect/Engineer and the Architect/Engineer desires to perform the services described herein with reference to the Project, for the consideration, and in accordance with the covenants, terms and conditions set forth herein;

NOW THEREFORE it is mutually agreed as follows:

PART I
ARCHITECT/ENGINEER RESPONSIBILITIES

- A. The Architect/Engineer agrees to perform professional services in connection with the above named Project as set forth herein. The services shall consist of services performed by the Architect/Engineer, its employees, and its consultants.
- B. The Architect/Engineer, its employees, and consultants shall be responsible in the performance of the services under this agreement for exercising the degree of skill and care consistent with customarily accepted professional and technical practices and procedures for Architect/Engineers performing the type of services required for this Project, while providing services as expeditiously as possible to maintain the orderly progress of the Project. The Architect/Engineer shall be responsible to the State for deficiencies in the services provided which result from the failure to meet the standard given herein.
- C. The Architect/Engineer shall prepare and submit to the State Engineer for approval a schedule for the performance of Architect/Engineer's services, which may be adjusted for reasonable cause as the Project proceeds, and which shall include allowances for periods of time required for review by the State agencies and approval of submissions and for approvals of governmental regulatory authorities with jurisdiction over the Project. This schedule, when approved by the State Engineer shall not, except for reasonable cause, be exceeded by the Architect/Engineer.

PART II
BASIC SERVICES

A. Programming Phase

1. The Programming Phase of this work shall be included in the schematic design phase of this Project.)
2. Upon approval by the Department of Tourism and State Development the program, schedule, and construction budget developed through the programming phase shall be incorporated in and form the basis of the services described herein.

B. Schematic Design Phase

The Architect/Engineer shall perform the following services as part of the schematic design phase.

1. Make a complete study of proposed site.
2. Have necessary conferences with the Department of Tourism and State Development, and the State Engineer, and other duly authorized personnel in order to determine and refine the required scope of the Project as determined in Part II.A above.
3. Take minutes of such conferences as stated in "2" above and for all such meetings and conferences during this and subsequent phases of the Project. Copies of the minutes are to be furnished to the State Engineer.
4. The Architect/Engineer shall employ specialists to evaluate and study special considerations of the Project, if such expertise is not available in their organization (see also Part II.D.5). If requested by the State Engineer, such specialists shall be present for conferences, design presentations, or inspection conducted for the Department of Tourism and State Development, the State Engineer, or other authorized personnel.
5. Prepare schematic design studies, preliminary plans, and a report including a description of proposed architectural, structural, mechanical, and electrical systems; and a preliminary code analysis indicating construction types, occupancy classification(s), and anticipated yard, floor area, exit protection needs, and similar considerations (see Part II.D.3 for relevant codes and standards) to properly inform the Department of Tourism and State Development and the State Engineer of the scale and relationship of the Project components.
6. Prepare an estimate of cost based on current conditions and date the estimate accordingly.
7. Submit, on or before **May 1, 2011**, four (4) copies of items covered in "5" and "6" above to the State Engineer for review by the Department of Tourism and State Development and the State Engineer.
8. Upon completion of the review by the Department of Tourism and State Development and the State Engineer, the Architect/Engineer shall make necessary revisions and alterations to the preliminary plans, report, and estimate, and resubmit same for approval to the State Engineer.
9. The Architect/Engineer shall receive written authority from the State Engineer prior to proceeding beyond this phase of the Project.

C. Design Development Phase

The Architect/Engineer shall perform the following services as part of the Design Development Phase.

1. Upon written authorization from the State Engineer prepare, in accordance with the approved schematic design phase program, schedule, and budget, those drawings, plans, elevations, outline specifications and other documents as necessary to fix and illustrate the size and character of the Project as pertains to type of architectural, mechanical and electrical systems, materials, and all other such items as may be appropriate.
2. Arrange conferences with the State Engineer, the Department of Tourism and State Development, and other authorized personnel to present and review the Design Development Documents. The

Architect/Engineer shall take and distribute minutes of this and all other Project meetings in which they participate.

3. Prepare for approval of the State Engineer a description of the number and content of bid packages, including separate material and equipment purchases, and phasing, scheduling, occupancy, and facility operation considerations.
4. Make necessary revisions to the documents as a result of the review conference(s). Advise the State Engineer of those adjustments to the previously approved schedule and budget recommended by the Architect/Engineer based upon the Design Development review.

D. Construction Documents Phase

1. Upon written notification from the State Engineer, prepare construction documents consisting of Drawings, Plans, and Specifications which set forth in detail the requirements for construction of the Project, based on the approved Design Development Documents and any adjustments in the schedule, cost, quality, or scope of the Project authorized by the State Engineer.
2. Upon receipt from the State Engineer of one copy of the front end documents including the Bidder's Checklist, Instructions to Bidders, Asbestos-Containing Materials Statement, format for the Bid Form, Bid Bond form, Contractor's Certification of Surety, Non-resident Bidder Affidavit, form of the Agreement for Construction Contracts, Performance and Payment Bond form, General Conditions for the Construction Contract, and format for the Special Conditions of the Construction Contract, the Architect/Engineer will prepare, for review by the State Engineer, the necessary bidding information, bidding forms, and the Special Contract Conditions, together with any suggested adjustments to the form of the Agreement with the Contractor or other documents provided.
3. Develop the design and the Construction Documents in accord with applicable State laws and codes. Architectural, structural, general, mechanical, plumbing, and the electrical design shall conform to the following standards that are current as of the date of authorization to proceed with the design development documents:
 - (a) The latest edition of the International Code Council's *International Building Code*, *International Fire Code*, and *International Mechanical Code* and the associated appendix chapters for each code,
 - (b) The latest edition of The American Society of Heating, Refrigerating and Air-conditioning Engineers' *Energy Efficient Design of New Buildings Except Low-Rise Residential Buildings*,
 - (c) The South Dakota State Plumbing Commission's rules and regulations governing the installation of plumbing,
 - (d) The State Electrical Commission's rules and regulations governing the installation of electrical wiring, fixtures, and equipment,
 - (e) The South Dakota State Glazing Law, and
 - (f) The *Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities*.

NOTE: Should there be a conflict between any of the above "Codes", Guides, or "Laws" the more stringent shall apply.

4. Assist the State in securing the necessary permits and making the necessary filings required to obtain the approval of governmental authorities having jurisdiction over the Project.
5. Employ such specialists as may be required to evaluate, study, and assist in design for special considerations of the Project if such professional expertise is not available in the Architect/Engineer's organization, except those services indicated in this agreement as being provided by the State. Employment of such specialists is part of the Basic Services provided under this agreement, except for those specialists as identified in Part IV.B (surveying services), Part IV.C (geotechnical engineering services).

- (a) If testing by the State reveals that Asbestos is involved in the Project, the State will engage an Asbestos Designer to develop bid documents specifically related to abatement of the Asbestos. The Architect/Engineer may be required to include these bid documents as a part of their specifications and drawings and will identify such documents as the work product of the Asbestos Designer. The Architect/Engineer may include the notation that they "are not responsible for said Asbestos documents included in this drawings and specifications." The bid documents shall state that the cost of Asbestos abatement must be treated as a separate bid item. Asbestos abatement cost is not to be included in the construction cost on which the Architect/Engineer fee is computed. The Architect/Engineer will not be expected to inspect or monitor any Asbestos abatement activities during the course of construction. However, the Architect/Engineer is expected to recognize the impact of the Asbestos abatement activities on their portion of the construction and to accommodate such impact in their design.
- (b) Recognizing that the Architect/Engineer is not responsible or liable for asbestos existing in place prior to commencement of this Project, or for the activities of any Asbestos Abatement Designer or Contractor, the Architect/Engineer is not required to carry professional liability insurance or insurance rider for asbestos abatement activities.

6. Submit to the State Engineer, on or before the date to be specified in the written authority to proceed with this phase, 4 complete sets of final plans and specifications for review by the Department of Tourism and State Development and the State Engineer.
7. Make necessary revisions as required based on review by the Department of Tourism and State Development and the State Engineer and following receipt of the Advertisement for Bids, submit four complete revised sets of final plans and specifications to the State Engineer.
8. Advise the State of any adjustments to previous preliminary estimates of construction costs and project budget necessitated by changes in requirements or general market conditions and submit for review new estimates dated the date the estimate is made to State.

E. Bidding Phase

The Architect/Engineer shall provide the following services as part of the bidding phase.

1. The State Engineer will advertise the Project and furnish the Architect/Engineer a copy of the advertisement for insertion in the specifications for bidding.
2. Assist the State in securing bids, including any appropriate notification of plan exchanges, contractors, or other organizations. Furnish plans and specifications to each bona fide bidder requesting the same, as well as to such major suppliers as is believed it would be advantageous to the State to use in quoting to contractors (Cost of plans and specifications is covered in Part XI.A).
3. Attend bid openings and prepare a written tabulation of bids received. Submit to the State Engineer a written analysis of the bids and a recommendation on awarding of contracts. As requested, provide other assistance in awarding or preparing contracts for construction.
4. Furnish to successful bidders to whom contracts have been awarded final plans and specifications as necessary for the prosecution of the Project or as required by the conditions of the construction contract (cost of said plans and specifications is covered in Part XI.A).

F. Construction Phase - Administration of the Construction Contract.

The Architect/Engineer shall provide services as described herein, and in accordance with the conditions of the construction contract provided under Part II.D.2, during the construction phase. Services under this phase shall commence upon award of contracts for construction.

1. Duties, responsibilities and limitations of authority of the Architect/Engineer shall not be restricted, modified, or extended without written agreement of the Architect/Engineer and the State Engineer.
2. The Architect/Engineer shall be the representative of the State during the construction phase of the Project, and shall advise and consult with the State Engineer and the Department of Tourism and State Development. Instructions to the contractor shall be forwarded through the Architect/Engineer. The

Architect shall have the authority to act on behalf of the State only to the extent provided herein and in the contract documents, unless otherwise specifically agreed in writing.

3. The Architect/Engineer will visit the construction site at intervals appropriate to the stage of construction, but averaging every two weeks, to keep generally familiar with the progress and quality of the work completed and to determine in general if the Project is being constructed in a manner such that when completed it would be in conformance with the plans and specifications and other contract documents. On the basis of such observations or inspections, the Architect/Engineer shall keep the State Engineer and the State Engineer's representative informed of the progress and quality of the work on the Project and endeavor to guard the State against defects and deficiencies in the work of the contractor. Every two weeks, the Architect/Engineer will provide a written report to the State Engineer and the State Engineer's representative as to the progress of the Project, items noted for correction, and remedial actions, if any, required. The State Engineer or an authorized representative of the State Engineer may attend such site visits or inspections, and other inspections or observance activities conducted by the Architect/Engineer, or may on their own observe or inspect the progress of the Project at other times, but the responsibility for performing any inspections or observance of the construction work in accordance with this paragraph remains with the Architect/Engineer. Any services provided pursuant to Part III.B shall be an additional service over and above the services to be provided under this paragraph.
4. The Architect/Engineer shall endeavor at all times to guard the State against defects and deficiencies in the Project as executed by the Contractors, however, the Architect/Engineer shall not be required to guarantee the performance of the Contractors.
5. Prompt written notice shall be given by the Architect/Engineer to the State Engineer if the Architect/Engineer becomes aware of any fault or defect in the Project or non-conformance with the contract documents.
6. The Architect/Engineer shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Project, since these are solely the Contractor's responsibilities under the Contract for Construction. The Architect/Engineer shall not be responsible for the Contractor's schedules or failure to carry out the Project in accordance with the Contract Documents. The Architect/Engineer shall not have control over or charge of acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Project, except to the extent that the Architect/Engineer may formally notify the Contractor of the unacceptability of various portions of the Project or failure to carry out the work on the Project in accordance with the contract documents. The Architect/Engineer will inform the Contractor on behalf of, and in consultation with, the State Engineer to cease work on the Project or portions thereof affected by those items that are unacceptable and remain uncorrected until such time as corrections are made. Nothing in this paragraph is intended to relieve the Architect/Engineer of its responsibility as set forth in this agreement to observe that the Project is completed in accordance with the plans, specifications, and contract documents.
7. The Architect/Engineer shall at all times have access to the Project wherever it is in preparation or progress.
8. Except as may otherwise be provided in the Contract Documents or when direct communications have been approved by the Architect/Engineer, the State and their representatives and the Contractor shall communicate through the Architect/Engineer. Communications by and with the Architect/Engineer's consultants shall be through the Architect/Engineer.
9. The Architect/Engineer will determine the amounts owing to the Contractor based on inspections and observations at the site, and on evaluations of the Contractor's Monthly Applications for Payment, and shall issue Certificates of Payment for amounts due on forms provided by the State Engineer. A Certificate of Payment constitutes a representation by the Architect/Engineer to the State, based upon the inspections and the information provided by the Contractor in the Application, that the Project has progressed to the point indicated; that to the best of the Architect/Engineer's knowledge, information, and belief, the quality of the work on the Project is in accordance with the Contract Documents; and that the Contractor is entitled to payment in the amount certified.
10. The Architect/Engineer shall have authority to reject work on the Project, which does not conform to the Contract Documents. Whenever the Architect/Engineer considers it necessary or advisable for implementation of the intent of the Contract Documents, the Architect/Engineer will have authority to

require additional inspection or testing of the work in accordance with the provisions of the Contract Documents, whether or not such work is fabricated, installed, or completed. However, neither this authority of the Architect/Engineer nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect/Engineer to any Construction Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons performing portions of the work on the Project.

11. The Architect/Engineer shall review and approve or take other appropriate action on Shop Drawings, Product Data and Samples submitted by Construction Contractors to determine if they conform with the design concept for the Project and with the information provided in the Contract Documents, and submit these documents or information to the State Engineer indicating the Architect/Engineer's approval or comments with reasonable promptness so as to cause no delay to the prosecution of the Project.

Approval or acceptance of a specific item shall not necessarily indicate the Architect/Engineer's approval of an assembly of which the item is a component. When professional certification of equipment is required by the Contract Documents, the Architect/Engineer will be entitled to rely upon that certification to determine that the materials, systems, or equipment will meet the performance criteria required in the Contract Documents.

12. Architect/Engineer will consult with and advise the Department of Tourism and State Development and the State Engineer during construction on any items which concern interpretation of design. The Architect/Engineer will make recommendations to the Department of Tourism and State Development on any adjustments that may be proposed by the Contractor or the State agencies involved in the Project. The Architect/Engineer shall make such necessary drawings or prepare descriptive information for change order proposals as required and shall review the proposals for accuracy and recommend approval to the State Engineer; after proposals are accepted by the State Engineer, the Architect/Engineer shall prepare the necessary change order documents on forms provided by the State Engineer.
13. Architect/Engineer will conduct, at the time and place approved by the State Engineer, with representatives of the State agencies involved in the Project and the Contractor, inspections to establish dates of Project acceptance and completion. The Architect/Engineer shall have other Architects, Structural, Mechanical, or Electrical Engineers, or other consultants in their employ in attendance at this and at various progress inspections as may be necessary to evaluate whether the work completed on the Project is in conformance with the Contract Documents. Architect/Engineer will receive and forward to the State Engineer, with comments on completeness or acceptability, those warranties, operation manuals, and other documents required by the Contract Documents and assembled by the Contractor.
14. Architect/Engineer will review the final estimate for final payment to the Contractor and provide a Certificate of Final Payment to the State Engineer.
15. Architect/Engineer will provide to the State Engineer, Department of Tourism and State Development, or the Contractor, upon written request, interpretations and decisions in writing, or in the form of drawings, on matters concerning performance under the Contract Documents, and execution or performance of the work on the Project. Response to such requests shall be made with reasonable promptness and within any time limits agreed upon. The final decision on all such questions shall be made by the State Engineer on behalf of the Department of Tourism and State Development.
16. Architect/Engineer will maintain a log of all Request for Proposals and Change Orders.
17. Architect/Engineer shall attend monthly construction progress meetings and take minutes of said meetings. Architect/Engineer shall publish minutes of said meetings to the Owner, State Engineer, and Contractor.
18. When the Project is completed, the Architect/Engineer will furnish two sets of reproducible reproductions of the drawings, on mylar or other medium acceptable to the State Engineer, and one set of the drawings and project technical specifications for computer access on CD-ROM or approved alternate for use with Autocad, with all construction changes duly noted, to the State Engineer for the State's permanent files, together with a summary of all final program requirements and design criteria and data.

PART III
ADDITIONAL SERVICES

A. The services described in this Part III are not included in the Basic Services. They shall be paid for by the State in addition to the compensation for Basic Services unless otherwise indicated in this agreement.

1. If services described under Contingent Additional Services in Part III.C are required, the Architect/Engineer shall promptly notify the State Engineer of the anticipated scope of such services prior to commencing same and will not proceed without written notice from the State Engineer.
2. If the services described under Optional Additional Services in Part III.D are required for the completion of the Project in accordance with the approved schedule, the Architect/Engineer shall notify the State Engineer in a timely manner to allow the State to obtain these services in a manner that best suits the State's needs.

B. Project Representation Beyond Basic Services

1. When more extensive representation at the Project site than is described in Part II.F.3 is required and authorized by the State Engineer, the Architect/Engineer shall provide one or more Project representatives to assist in carrying out such additional on-site responsibilities.
2. Project representatives shall be selected, employed and directed by the Architect/Engineer, subject to the approval of the State Engineer. The Architect/Engineer shall be compensated for these representatives at such rates as are mutually agreed upon at the time of approval, which shall be set forth in an amendment hereto. The duties and responsibilities of the Project representative shall be delineated in the Amendment to this agreement authorizing those services.
3. The Architect/Engineer shall endeavor through the observations, reports, and inspections of such Project representatives, to provide further protection for the State against defects and deficiencies in the Project, but the furnishing of Project representation will not otherwise modify the rights, responsibilities, or obligations of the Architect/Engineer as set forth elsewhere in this agreement.

C. Contingent Additional Services

Contingent additional services consist of:

1. Making revisions in Drawings, Specifications or other documents when such revisions are:
 - (a) Inconsistent with approvals or instructions previously given by the State, including revisions made necessary by adjustments in the State's program or Project budget (this does not include revisions made in accordance with the implementation of Parts V.C or D);
 - (b) Required by the enactment or revision of codes, laws or regulations subsequent to the initiation of the preparation of Contract Documents (Part II.D); or
 - (c) Due to changes required as a result of the State's failure to render decisions in a timely manner.
2. Providing services required because of significant changes in the Project including, but not limited to, size, quality, complexity, the State's schedule, or the method of bidding or negotiating and contracting for construction, except for services required under Part V.D. For those changes in the Project, which result in an increase in services, the Architect/Engineer shall be compensated in accordance with Part XII. B.
3. Providing consultation concerning replacement of the Project, or any part thereof, or work done thereon, damaged by fire or other cause during construction, and furnishing services required in connection with the replacement of the Project.
4. Providing services made necessary by default of the Contractor, or by failure of the State to perform its obligations under the Contract Documents on this agreement.
5. Providing services in connection with public hearings, arbitration, or legal proceedings except where the Architect/Engineer is a party thereto or as required in the performance of Part II.D.4 of this agreement.

D. Optional Additional Services

Optional additional services include:

1. Financial Feasibility or other studies
 2. Planning surveys, or comparative studies of prospective sites
 3. Special surveys, environmental studies, and similar submissions needed for approval of governmental authorities having regulatory jurisdiction
 4. Coordination of construction performed by five or more building construction contractors
- E. Services required because of an extension of the construction schedule resulting from events for which the Contractor is entitled only to a time extension as set forth in Article 10 of the State's General Conditions for construction, are not additional services and the Architect/Engineer shall not be compensated for such services.
- F. If the Architect/Engineer wishes to make a claim for an increase in the contract fee, they shall give the State written notice thereof within ten (10) days after the occurrence of the event, giving rise to such claim. Supporting documentation for any claim arising prior to substantial completion of construction shall be submitted to the State no later than thirty (30) days after substantial completion. Supporting documentation for claims arising after substantial completion shall be submitted to the State no later than fifteen (15) days after final completion of construction. Any change in the contract fee shall be authorized by formal written modification signed by the State. No claim for an increase in the contract fee shall be valid unless made in accordance with this section.

PART IV
OWNER'S RESPONSIBILITIES AND COORDINATION

- A. The State Engineer will be the State's representative and is authorized to act in the State's behalf with respect to the Project and this Agreement. The State Engineer or an authorized representative of the State Engineer shall examine the documents submitted by the Architect/Engineer and described herein, and shall render decisions pertaining thereto promptly, to avoid unreasonable delay in the progress of Architect/Engineer services. The State Engineer shall at all times have access to the Project site. The State Engineer will notify the Architect/Engineer promptly upon discovery of any materials, methods, or other features of the services, which do not meet the State's approval. The Architect/Engineer shall also designate a member of its organization who will be responsible for the execution of the services and who will be the authorized representative of the Architect/Engineer regarding the services. The Architect/Engineer's Representative shall be a principal of the firm or other individual subject to approval by the State Engineer.
- B. The State, with procurement and coordination assistance of the Architect/Engineer when requested, shall furnish surveys describing physical characteristics, legal limitations, and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements, and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries, and contours of the site; locations, dimensions, and necessary data pertaining to existing buildings and other improvements adjacent to but not affected by the Project; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths as may be reasonably determined from available information. All the information on the survey shall be referenced to a Project benchmark.
- C. The State shall furnish the services of geotechnical engineers, when such services are requested by the Architect/Engineer and as are determined appropriate by the State Engineer. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion, and resistivity tests, including necessary operations for anticipating subsoil conditions, with reports and appropriate professional recommendations.

PART V
CONSTRUCTION COSTS AND PROJECT BUDGET

- A. The Architect/Engineer shall develop and prepare a Project budget in a format acceptable to the State Engineer, including a detailed estimate of construction costs, dated the actual date the estimate is made. The Project budget shall be updated and reviewed with the State at intervals appropriate to the Project. Architect/Engineer shall advise

the State Engineer of any adjustments to the budget and estimate of construction costs required by changes in Project scope, quality, or requirements and by general market conditions, and shall submit such proposed adjustments to the State Engineer for approval. The budget and estimate of construction costs represent the Architect/Engineer's best judgment as a design professional familiar with the construction industry. It is recognized, however, that neither the Architect/Engineer nor the State has control over the various components of construction costs, and therefore the parties acknowledge that the Architect/Engineer does not warrant or represent that the Project budget and estimate of costs will not vary from those submitted to, and approved by the State.

- B. The "Fixed Limit of Construction Cost" for the Project shall be set at: **to be determined after Schematic Design**. The Architect/Engineer shall advise the State Engineer when, in its opinion, subsequent Project scope changes require either an adjustment of the Fixed Limit of Construction Costs or adjustments in the scope of construction. The Architect/Engineer shall propose recommended adjustments in the scope of construction necessary to keep the Project within the Fixed Limit of Construction Cost.
- C. If the Fixed Limit of Construction Cost is exceeded by the lowest bona fide bid or proposal received, the State Engineer may:
1. Recommend acceptance of the lowest bona fide bid, however, such acceptance shall not increase the Architect/Engineer's fee under Part XII of this agreement;
 2. Approve re-advertisement and bidding of the Project as designed;
 3. Terminate the Project; or
 4. Assist in revising the scope and quality of the designed Project as necessary to sufficiently reduce the Construction Cost.
- D. If the State elects to implement Part V.C.4, the Architect/Engineer shall modify the Contract Documents as required to comply with the Fixed Limit of Construction Cost with no additional compensation.

PART VI A OWNERSHIP OF WORK PRODUCT

Upon payment as herein provided, the reports, plans, specifications, engineering calculations, technical data, all miscellaneous drawings, and all information contained therein provided by Architect/Engineer in connection with its performance under this Agreement shall become the property of the State. The State hereby grants the Architect/Engineer the right to retain copies of such materials and information to use these materials in any future work with the state. The Architect/Engineer may not disseminate these materials to any person or entity nor may the Architect/Engineer use these materials for purposes other than work for the state, without the express written approval of the state.

It is agreed that the Architect/Engineer will not be responsible for the state's use of these materials and information for purposes other than the Project, unless there is a written agreement between the parties specifying otherwise.

PART VI B CONFIDENTIALITY OF WORK PRODUCT AND INFORMATION PROVIDED BY STATE

All reports, plans, specifications, engineering calculations, technical data, miscellaneous drawings, and information contained therein provided or prepared by the Architect/Engineer, its owners, officers, employees, agents, consultants, and contractors in connection with its performance under this Agreement and all such information provided by the state to the Architect/Engineer for the performance of this agreement are confidential and the Architect/Engineer, its owners, officers, employees, agents, consultants, and contractors shall not disclose this information to any person, individual, or entity without the express written permission of the state.

The Architect/Engineer shall include the requirements of PART VI A and PART VI B in any contract it enters into with other designers, consultants, contractors, persons, individuals, or entities for the performance of any of the Architect/Engineer's obligations under this agreement.

PART VII DISPUTES

Unless otherwise specifically provided in this Agreement, all claims, counter-claims, disputes or other matters in questions between the State and the Architect/Engineer arising out of, or relating to this Agreement, or the breach thereof, will be decided by direct negotiations, by non-binding mediation if the parties mutually agree, or in a circuit court of competent jurisdiction within the State of South Dakota. Notice of a request for mediation shall be sent in writing to the other party to this Agreement within a reasonable time after the claim, dispute, or other matter in question has arisen. If the party receiving notice of request does not agree to mediation in writing within 10 calendar days, it will be deemed that the parties do not mutually agree to mediate the matter. If the parties agree to mediate, a mediator to hear the dispute will be agreed upon by the parties. If agreement on a mediator can not be reached, the State shall select the mediator.

PART VIII TERMINATION

- A. This Agreement may be terminated in whole or in part by either party in the event of substantial failure by either party to fulfill its obligations under this Agreement through no fault of the terminating party, provided, however, that no termination may be effected unless the other party is given 1) not less than 10 calendar days written notice of intent to terminate, and 2) an opportunity for consultation with the terminating party prior to termination. The party receiving the notice will have 10 calendar days from receipt thereof to cure the alleged default.
- B. If termination for default is effected by the State, an equitable adjustment in the compensation provided for in this Agreement shall be made, but 1) no amount shall be allowed for anticipated profit on unperformed services or other work, and 2) any payment due to the Architect/Engineer at the time of termination may be adjusted to cover any additional costs to the State because of the Architect/Engineer's default, provided that nothing herein is intended to limit State's right to seek damages for any default.
- C. If termination for default by the State is effected by the Architect/Engineer, or if the Project, or any part thereof is canceled as provided in Part IX of this Agreement, the equitable adjustment shall include payment to the Architect/Engineer for services performed and expenses incurred up to the date of termination consistent with the payment provisions of Part XI, in addition to termination settlement costs reasonably incurred by the Architect/Engineer relating to commitments which had become firm prior to the date of the termination notice.
- D. Upon receipt of a termination notice, the Architect/Engineer shall promptly discontinue all effected work, unless the notice directs otherwise, and shall promptly deliver to the State all plans, specifications, drawings, estimates, data, reports, and such other information and materials accumulated by Architect/Engineer in performing services hereunder, whether complete or in process.
- E. If, after termination by the State for default, it is determined that the Architect/Engineer had not failed to fulfill contractual obligations, the termination shall be deemed to have been a cancellation of the Project under Part IX, hereof, and an equitable adjustment of the compensation shall be made as provided in subsection C of this Part.

PART IX CANCELLATION OF THE WORK

The State may, without being in default under this Agreement, cancel all or any portion of the services provided under this Agreement by giving 20 days written notice to the Architect/Engineer. In the event of such cancellation the State shall pay to the Architect/Engineer all compensation earned up to the effective date of cancellation, and an equitable adjustment in compensation shall be made to provide the Architect/Engineer with reasonable compensation for the costs of winding down its services and canceling its performance of services under this Agreement, including those relating to commitments which had become firm prior to the date of the termination notice. Upon cancellation the Architect/Engineer shall turn over to the State Engineer all data, plans, specifications, drawings, and information gathered or developed for any uncompleted services covered by the Agreement.

PART X MISCELLANEOUS PROVISIONS

- A. This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota.
- B. This Agreement constitutes the entire agreement among the parties with reference to the services described herein, and shall not be amended or modified except in writing, signed by an authorized representative of each

party. This Agreement supersedes all prior negotiations, representations, or agreements, whether oral or written, relating to the services herein described.

- C. This Agreement may not be assigned or transferred by any party hereto without the prior written consent of the other parties. This Agreement and the covenants herein contained, shall inure to the benefit of, and be binding upon, the successors and assigns of the respective parties hereto.
- D. Should any part, term or provision of this Agreement be determined by the Courts to be illegal, unenforceable, or in conflict with any law, the validity of the remaining portions or provisions shall not be affected thereby, and an equitable adjustment to the Agreement with respect to the affected part, term or provision shall be made by the parties.
- E. The Architect/Engineer shall perform the services described herein as an independent contractor, and not as an employee of the State. The Architect/Engineer will not use the State's equipment, supplies, or facilities.
- F. The Architect/Engineer shall be responsible for all taxes, assessments, permit fees, or other charges pertaining to its performance of the services pursuant to this Agreement, including exclusive liability for all contributions, taxes, or payments required to be made on account of the Architect/Engineer's employees under State and Federal laws relating to unemployment compensation, worker's compensation, income tax, social security, or other legislation requiring the payment of similar contributions or taxes.
- G. The Architect/Engineer shall comply with all applicable Federal, State and local laws, regulations, and ordinances with reference to the services performed hereunder.
- H. Neither party shall be considered in default in the performance of its obligations hereunder to the extent that the performance is prevented or delayed by any cause which is beyond the reasonable control of the affected party, and the time of performance of either party hereunder shall in such event be extended for a period equal to any time lost as a result thereof, and an equitable adjustment shall be made in the compensation by mutual consent.
- I. The Architect/Engineer will maintain and provide necessary supporting documentation for audit purposes during the term hereof and for a period of one year after the completion of services hereunder. Accounting records shall be kept on the basis of generally accepted accounting principles. Records shall be available to the State or its authorized agents and representatives upon request during normal business hours at mutually convenient times.
- J. Architect/Engineer agrees to indemnify and hold the State, its officers, agents, and employees harmless from and against any and all actions, claims, suits, damages, liability, or proceedings of any kind or character whatsoever, including reasonable attorney's fees, which may arise from or in connection with the negligent performance of services hereunder. This section does not require the Architect/Engineer to indemnify the State, its officers, agents, or employees from claims or liability arising solely from the acts or omissions of the State, its officers, agents, or employees.
- K. During the term of this Agreement, the Architect/Engineer shall maintain in effect at all times, and provide proof of such coverage to the State, insurance coverage for this Project at the limits set forth herein:

<u>Type of Coverage</u>	<u>Limits</u>
Workers Compensation and Employers Liability	<u>Statutory</u>
Professional Liability	<u>\$1,000,000</u>
Commercial General Liability, Including Property Damage (Per occurrence)	<u>\$1,000,000</u>
Business Automobile Liability (Per occurrence)	<u>\$1,000,000</u>

1. The Architect/Engineer shall submit insurance policies to the State Engineer for review and approval when requested.
2. Professional Liability coverage shall be continued for a minimum of 3 years after the date of the certification of the final contractor's payment request.

3. If Commercial General Liability insurance contains a general aggregate limit it shall apply separately to this Agreement or be no less than two times the occurrence limit.

- L. Extension of the Project completion date must be mutually agreed upon in writing between the Owner and A/E. Reasonable requests for time extensions will be accepted. If the State Engineer determines that to the extent the A/E's negligent performance of services has caused a delay to the contractor in the fulfillment of their contractual completion date or to the Owner of the agreed upon design or Project completion date, documented costs incurred by the Owner as a result of this delay shall be deducted from the total A/E fee described in Part XII.A. Furthermore, the A/E will not be paid for work performed related to such delay. Notwithstanding any other language in this Agreement, the A/E shall not be responsible for delays caused by factors beyond the A/E's reasonable control, including, but not limited to delays because of strikes, lockouts, work slowdowns or stoppages, accidents, acts of God, failure of any governmental or other regulatory authority to act in a timely manner, or those caused by the State or any other contractors.
- M. Any notice provided for or permitted by this Agreement shall be sufficient when mailed (by registered or certified mail, return receipt requested, postage prepaid), faxed, or through email communication, confirmation received. If notice is given by telephone it must be confirmed in writing, sent by any of the above methods on the same day; addressed to the parties as follows at the following addresses, or such other address as may be provided by any party by notice, and shall be deemed effective upon receipt:

If to the State

Bureau of Administration
Office of the State Engineer
Attn: Kristi Honeywell, P.E., State Engineer
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501-3182
Phone: 605.773.3466 Fax: 605.773.5980
Email: Kristi.honeywell@state.sd.us

Attn: Jason Haug, Historic Preservation Officer
South Dakota State Historical Society
Cultural Heritage Center, 900 Governor's Drive, Pierre SD, 57501
Phone: 605.773.6296 Fax: 605.773.6041

If to the
Architect/Engineer

Architecture Incorporated
Attn: Mitchell Aldinger, AIA, Principal Architect
415 S. Main Ave., P.O. Box 2140
Sioux Falls, SD 57101-2140
Phone: 605.339.1711 Fax: 605.339.2331

PART XI
PAYMENTS TO THE ARCHITECT/ENGINEER

The amounts due shall be paid to the Architect/Engineer on a monthly basis, in proportion to services performed within each Phase of Services as described herein, on the basis set forth in Part XII. Architect/Engineer will submit monthly invoices together with a signed state voucher with each request for payment. Payment will be made in accordance with SDCL Ch. 5-26 upon receipt of a properly completed voucher and supporting invoice. Architect/Engineer's expenses will not be paid as a separate item.

- A. There shall be no charge to the State for preliminary or review drawings and specifications and up to 4 sets of final drawings and specifications. All sets above 4, including postage and binding, will be charged to the State as a reimbursable expense at cost (no profit).
- B. No extra payment will be made by the State for Record Drawings ("as built") unless, in the opinion of the State Engineer, the magnitude of change orders and/or observed field conditions are significant enough to warrant a negotiated hourly or lump sum payment for same.
- C. Architect/Engineer planning for change orders resulting from a Program Change on the part of the State will be negotiated on an hourly or lump sum payment.

- D. If in the Construction Phase the Contractor's completion date is exceeded, and if liquidated damages are assessed the Contractor, the Architect/Engineer will be compensated for their extra services beyond the completion date by sharing a negotiated portion of said liquidated damages.

PART XII
BASIS OF COMPENSATION

- A. The fee to be paid to the Architect/Engineer for Basic Services shall be **not to exceed \$17,500.00, through Schematic Design phase (Part II B).**
- B. In the event of a change in the scope of the Project, which results in additional work by the Architect/Engineer, an increase in the fee to be paid the Architect/Engineer shall be negotiated.
- C. Upon satisfactory completion and approval by the State Engineer on behalf of the Department of Tourism and State Development of the Schematic Design Phase given in Part II.B (above) the Architect/Engineer shall be paid a sum of **\$17,500.00.**
- D. The State will make monthly progress payments through the Design Development, Contract Documents, Bidding and Construction Administration phases of the work. The Architect/Engineer shall document to the satisfaction of the State Engineer the actual percentage of completion of each phase. Monthly progress payments shall be made such that compensation for each phase shall equal the following percentage of the total compensation.

Schematic Design Phase & Design	35%
Development Phase	35%
Construction Documents Phase	10%
Bidding Phase	20%
Construction Phase	100%
Total	100%

1. The portion of the calculated fee payable through the Schematic Design and Design Development Phases shall be reduced by the amount of the lump sum fee paid in Part XII.C above.

PART XIII
TERM OF AGREEMENT

This Agreement shall commence upon the execution hereof by all signatories and, if all other terms and conditions are satisfied, shall end 60 days following the issuance of a Final Certificate of Payment to the Contractor, unless otherwise terminated or extended pursuant to the terms hereof.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed in one original counterpart the day and year above first written.

CONSULTANT: ARCHITECTURE INCORPORATED
415 S. MAIN AVE., P.O. BOX 2140
SIOUX FALLS, SOUTH DAKOTA 57101-2140

BY: _____

TAX ID #: _____

RECOMMENDED BY
THE OFFICE OF THE STATE ENGINEER

Kristi Honeywell 12-8-10
KRISTI HONEYWELL, P.E. (Date)
State Engineer

STATE OF SOUTH DAKOTA
Department of Tourism and State Development

Richard Benda 12-22-10
RICHARD BENDA (Date)
Secretary
Department of Tourism and State Development

